MICHIGAN SUPREME COURT

PUBLIC HEARING
May 28, 2014

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CHIEF JUSTICE YOUNG: Good morning and welcome to this session of our public administrative conference where members, in addition to providing written feedback on various of the administrative rule changes that have been proposed, the public and members of the Bar can publically comment on these matters. Justice Zahra has a doctor's appointment and will not participate in person, but will participate by reviewing the videotape of the proceeding. So with those preliminaries, I call the first item which is proposed amendments of MCR 3.210 which concerns the incorporation of different default rules in domestic relations cases in clarifying the procedural issues associated with that. On that matter we have three speakers, the first of which is Mr. Harrington,

ITEM 1 2010-32 – MCR 3.210

MR. HARRINGTON: Thank you and good morning. When I was here two years ago on ADM 2010-32, Justice McCormack and Justice Viviano were not on the bench yet.

CHIEF JUSTICE YOUNG: See what you've done

MR. HARRINGTON: I would hope you'd appreciate that. At that time there was significant opposition from the domestic violence community, from the civil procedure community. In fact, the State Bar was opposed to the resolution that we had proposed at that time. Our message was to go back to the drawing board. We met with Janet Welch, we met with the interested parties from the DV community etc., and we have resolved those issues. We have received the support of the Michigan Judges Association. We have received the support of the State Bar of Michigan. We received the support of the DV community. And Janet Welch's message – or letter from the Commissioners has been filed with the Court. The problem that ADM 2010-32 attempts to address is the issue of self-representeds in divorce cases and Judge Feeney from Kent County and Judge Young five years ago took the bull by the horns and decided to try and empower the judges to deal with those issues of self-representeds who were in default. And when they're in default, you have one or two options – either set aside the default and the case starts over or you hold them in

default and then how does the judge take the proofs – how does the judge make findings if you have a party who is in default in front of them. Under *Coy v Coy*, the judges must make findings of fact on custody and property issues. What the current proposal, supported by all of the interested parties, does is to give the judges a toolbox and give them the additional discretion if they have a party in front of them who may be in default. The judge is not required to set aside the default. The judge could permit the father, for example, to testify on the limited issue of support or income or the like. The State Bar has approved and the State Bar has also supported the position I think of the speaker to follow which is that of the prosecuting attorneys who has a different set of interests. The Family Law Section voted on May 3rd unanimously to support this final version. We have no quarrel with the position of the prosecutors that they feel that they should have separate rules applicable to them. The State Bar takes the same position –

CHIEF JUSTICE YOUNG: You say you have – excuse me – you say you have no objection to them having a special rule.

MR. HARRINGTON: The Family Law Section does not. I think the judges may. I think the judges may feel that for logical and legal consistency they should have to make the same findings. The Section doesn't share that concern and even if we did we couldn't take a position opposite the State Bar without their permission. So we are asking your careful consideration. We didn't have the support we needed last time; right now we do have the support of the MJA, the State Bar of Michigan, the domestic violence community, and the Court Rules and Procedures Committee so kindly look with favor on this proposal.

CHIEF JUSTICE YOUNG: Thank you very much.

MR. HARRINGTON: Thank you.

CHIEF JUSTICE YOUNG: Mr. Sweet, Assistant Prosecutor from Ingham County.

MR. SWEET: Good morning and may it please the Court. I'm Assistant Prosecutor Guy Sweet from Ingham County. I'm assigned to our Family Support Unit which means that I practice exclusively in the realm of paternity and family support matters. My position on these amendments is they're perfectly fine for divorce cases, but they should not apply to paternity and family support matters and I have three reasons to support that position. First, as is clear from the written comments and

from the speaker before me, these amendments were triggered by concerns that judges were having about divorce cases and divorce cases are fundamentally unique. They involve issues such as identification and allocation of marital property, identification and allocation of marital debt, whether or not a qualified domestic relations order needs to enter, does the wife get to retain her maiden name, who pays for the piano lessons and who has to fund the college educations – none of those issues are ever present in a paternity or family support matter. Paternity/family support matters involve two and only two issues. Issue number one, does the defendant have a legal duty to support the child – in other words is he or she a parent of the child. Issue number two, what amount of support does he or she owe under the family – excuse me – under the child support formula. Those are the only issues that are dealt with in those cases. So why do we want to graft divorce rules onto cases that don't involve divorce issues – that's my first point. My second point is that the general default rule under 2.603 works perfectly well in paternity and family support matters. The procedure is fairly straightforward, there are basically four steps. If there's no answer, plaintiff's counsel submits an application for default, the clerk of the court examines the file, makes sure there's a return of service, determines whether or not an answer's been filed. If not, a default enters. Step three, the notice of default is served on the defaulted party. Step four, a proposed judgment is submitted to the court. The rule specifically states that if the judge feels a need to convene a hearing to resolve the truthfulness of an allegation or investigate any other matter, the judge has every right to convene a hearing, bring the parties in, and resolve whatever matter there is. For example, if a default judgment comes across the judge's desk and the judge looks at the uniform support order and says, gee, that support seems awfully high, that judge has every right to bring the parties into court and say explain how you got this number – explain why this is a fair right-sized child support order. So in terms of toolboxes, the judges have that tool – it's been available to them ever since 2.603 was adopted. My third argument –

CHIEF JUSTICE YOUNG: I'm going to ask you accelerate it because you're out of time.

MR. SWEET: Oh, okay. I'll be happy to take questions.

JUSTICE MARY BETH KELLY: Why would that be the judge's obligation? Why would it be up to the judge to review an order

and determine if he or she believes that the support order is set too high? Why would that be within the judge's realm?

MR. SWEET: Because anytime a judge signs an order the judge is essentially certifying that he or she has reviewed the order and finds it to be appropriate for the case – that's true of consent judgments, that's true of post-verdict judgments, that's true of 7-day orders. Judges always have that responsibility and that authority.

JUSTICE MARKMAN: Do you agree that our court rules over time should come increasingly to reflect actual practices that take place in the courtroom?

MR. SWEET: Yes.

JUSTICE MARKMAN: Do you think that your proposals are in fact moving us in that direction?

MR. SWEET: Yes.

JUSTICE MARKMAN: That's all I have.

MR. SWEET: Thank you.

CHIEF JUSTICE YOUNG: Thank you very much. The third and final speaker on Item 1 is Ms. Sherburn, Assistant General Counsel, Wayne County Circuit Court Family Division.

MS. SHERBURN: If it please the Court, I am Cynthia Sherburn, as you said, Assistant General Counsel for the Family Division of the 3rd Circuit Court. I agree with what Mr. Sweet had just presented today and we want to just bring this Court's attention to the level of the problem in the 3rd Circuit Court. In our court, unlike most of the other counties in Michigan, our friend of the court attorneys – a segment of them – are cross-appointed as special assistant prosecuting attorneys to handle the establishment of DP and DS cases – the establishment of paternity for purposes of establishing support. In our court in 2013 we had just shy of 19,000 cases either brought or reopened during the year – just shy of 19,000 cases. Having a hearing in each of those cases and every one of those cases would be a large burden on our court. We wanted to raise that to you because this is not insignificant. In the best of all possible worlds if we have all the money on earth, yes, we'd be happy to have a hearing on absolutely everything, but it is not that way. We're also faced with a statute in the Paternity Act that says

that we can enter defaults without having a hearing. And I believe that the court rule as it is proposed has ridden over that particular statute and come up with something procedurally that isn't allowed by the substance of the statute. So that's a concern of ours. In the 3rd Circuit Court we have been handling these DP and DS cases by consents and default judgments. Our numbers last year show that we had approximately 45 percent of our DS cases handled by default or by consent. We had approximately 40 percent of the DP cases handled by default or consent. We would like to continue that practice for obvious financial reasons – the financial cost to us is very huge on this – and we do want an appropriate compromise for anyone. We agree that the equities of cases in divorce demand that those cases be heard – I agree with Mr. Sweet on that – and the court would – my court would agree with that. But when it comes to these cases where we have low participation of people – even if we have hearings unfortunately they're not likely to show up, the population is not likely to show up. I did speak with Judge Young about this court rule and she told me one of the reasons she felt very strongly about hearings was that at hearings she was hearing that there was bad service and the bad service should not have resulted in a default judgment. If the problem is bad addresses and bad service, there's a different solution to that other than going in and changing the default judgment rules.

CHIEF JUSTICE YOUNG: What is it?

MS. SHERBURN: When it comes to that there actually are much better processes online, products available online for service – for getting addresses now.

CHIEF JUSTICE YOUNG: Judge Young says that she hears I guess enough complaints about bad service that it causes her to be resistant to the change that the prosecutors and your court has proposing.

MS. SHERBURN: Right.

CHIEF JUSTICE YOUNG: So how do you address that? You said there are other alternatives, what are they?

MS. SHERBURN: I have talked to Ms. Frisch who is the head of the DHS –

CHIEF JUSTICE YOUNG: Let me just –

MS. SHERBURN: I've talked to her and she says there's another product to get better addresses now and it is in the offing right now.

CHIEF JUSTICE YOUNG: But that's on the front end – getting better service.

MS. SHERBURN: Right.

CHIEF JUSTICE YOUNG: When you have bad service – by whatever product – if you don't have a hearing, you don't hear that. So what is it that your proposal and that that's advanced by the prosecutors, helps address the fact that every day there is bad service? How does the person who didn't get good service – proper service get his day in court to say I was never served.

MS. SHERBURN: Your honor, for a long time within our Michigan court rules we've had rules devoted to just that. If there is improper service there's a void judgment – that's under MCR 2.612 – that exists, it's there, and it does take those people out of those situations.

CHIEF JUSTICE YOUNG: That requires a hearing at some point, right?

MS. SHERBURN: I agree that it does.

CHIEF JUSTICE YOUNG: Why not have the hearing at the earliest point to find that out?

MS. SHERBURN: Realistically if the person's gotten bad service, they probably don't – wouldn't know about the hearing anyway. I don't know how all these things come about – they are surely fact patterns on all of these –

JUSTICE MARY BETH KELLY: But if you're suggesting that a hearing under the relief from judgment court rule is a remedy as opposed to a hearing from the bad service – the default judgment, the question remains why not just challenge the bad service as relief from judgment – as the default judgment because that's what it is and deal with it as a default judgment court rule. Why not do that? Now the issue of separating out these paternity cases, why would not an order of paternity be challenged at the front end so to speak, do we really want the court entering some 20,000 orders of paternity based on in some part bad addresses. Is that the kind of orders that we want the court entering?

MS. SHERBURN: Of course we don't want that and that's –

JUSTICE MARY BETH KELLY: So why doesn't this court rule further the end of entering paternity orders based on defendants who have received good process and weaning out so to speak those defendants who have not received good process based on default judgment as opposed to relief from judgment?

MS. SHERBURN: We have a difficult problem down in the 3rd Circuit Court as your honors –

JUSTICE MARY BETH KELLY: But why would we make a court rule based on the 3rd Circuit Court as opposed to the state as a whole? If the 3rd Circuit Court is having a problem, they need to solve it, don't they?

MS. SHERBURN: Well, I surely believe that we ought to, but the reality is in the 3rd Circuit Court the cases on which these defaults are being entered are brought by DHS. They are brought within the court off the rolls of people who have gotten assistance.

JUSTICE MARY BETH KELLY: And this is going back to the bad addresses, right?

MS. SHERBURN: It is going back and that's –

JUSTICE MARY BETH KELLY: Okay, and again the problem remains if an order of paternity is established based on a bad address shouldn't that order of paternity be challenged under a default judgment court rule rather than the relief from judgment – 2.116 – the 6(12) rule because relief from judgment is based on a different set of criteria, right?

MS. SHERBURN: Well, void judgments are void judgments. If you don't have jurisdiction – which is the bad address problem – then it is a void judgment and that statute never runs, it's an endless statute so that's always a void judgment.

JUSTICE MARY BETH KELLY: But just to understand your argument, it's really the bad addresses, right?

MS. SHERBURN: I think there's a huge problem with that. I know that DHS is aware of that and that they are working on that problem right now.

JUSTICE MARY BETH KELLY: Is there any other issue besides the bad addresses?

MS. SHERBURN: Not that I'm aware of your honor. When I discussed this with Judge Young, the bad addresses were her big concern – that we were getting people on this and I agree we don't want to see people with bad addresses and sometimes they're very clear to the judges when these orders come across their desk and they say, no, I mean our stats show that we have a significant level of cases dismissed by the court or dismissed by a party which I presume to be DHS in these cases because DHS is bringing the cases. So we have a large level of dismissals in these cases that probably result from somebody looking at it and saying, ah, something's wrong. DHS is given bad information by some of these moms. You can't get around that because the moms have often some kind of odd stake in not revealing the identity of the father and taking money from some other person who they want to see punished for some reason. This is something that is innate in the population –

JUSTICE MARY BETH KELLY: Okay, well those assumptions that you've set forth, be those as they may, those particular assumptions are not unique to your particular court.

MS. SHERBURN: I don't think so. I don't think they're unique. I think that we unfortunately – because we are such a large county – tend to be the bellwether in these things. If we see this stuff, it's going to happen everywhere and I believe when we see these problems arise in Wayne County it's a really good idea to work on them because they're going to show up across the whole state if they haven't already.

CHIEF JUSTICE YOUNG: Yet your solution is to ignore the core problem – lack of notice. And you're urging expediency to overcome something that's pretty core – the right to know that you are being called before a court. Is that the kind of rulemaking we should be promoting – expediency over the fundamental right of the litigants to know that they are actually being held accountable in court?

MS. SHERBURN: I think that that is at once too complex and too simple for what I'm presenting.

CHIEF JUSTICE YOUNG: It sounds pretty straightforward to me. We have too many cases to do it right.

MS. SHERBURN: I don't agree with that.

CHIEF JUSTICE YOUNG: Isn't that what you say?

MS. SHERBURN: No, actually DHS is giving us this information – or we're starting cases with DHS information and I suppose it's more of –

CHIEF JUSTICE YOUNG: I don't care where the problem originates, but the problem in the court is you are commencing actions against people over whom you may not have jurisdiction. And you're saying that's fine, we don't want to have a hearing, we don't want to have the possibility of those people coming and telling us they hadn't been served, we just want to move them through the pig.

MS. SHERBURN: Not really. We want to hear that they haven't gotten served if they haven't. The astonishing thing I think about the population we're dealing with – and this may be one way of helping get good addresses –

CHIEF JUSTICE YOUNG: I'm sorry; that was a bad – through the python.

MS. SHERBURN: Okay, that's fine.

CHIEF JUSTICE YOUNG: I mixed my metaphor here.

MS. SHERBURN: One of things that – with our population is they always manage to get their income tax refunds and their aid checks or whatever they're called –

JUSTICE MARY BETH KELLY: But again, let's not focus on your population because it's really the issue that we want to focus on –

MS. SHERBURN: Okay.

JUSTICE MARY BETH KELLY: and I think it's pejorative to start talking about particular populations.

MS. SHERBURN: Okay.

JUSTICE MARY BETH KELLY: The issue again, as the Chief Justice just pointed out, is how do we fix the core problem. And the core problem of a litigant who's brought before a court or who's given process that he or she may not have received can be fixed in one of two ways. And it can be fixed through this

proposed rule in the default judgment arena so to speak or it can be fixed as you propose through the relief from judgment court rule. And the issue remains why is this proposed rule not a better vehicle for fixing what at its core is a notice issue. And, again, I think talking about particular populations is not really advancing what the core issue is which, again, is notice.

MS. SHERBURN: In this instance if there is a failure of notice and we'll presume that there is hypothetically that there is one, the problem we have is that notice is being given based on bad information. There are ways to get better information now than when this rule as I understand was first proposed in 2008.

CHIEF JUSTICE YOUNG: That's an issue exogenous – it's an exogenous issue. It isn't anything that we can deal with in the rule. Absent any further questions, we're well over time. Thank you.

MS. SHERBURN: Okay, thank you, your honors.

CHIEF JUSTICE YOUNG: Item 2 has no endorsed speakers. Item 3 is 2012-11 – amendments proposed to MCR 6.302 – concerning whether to add language providing harmless-error provision similar to the federal rules. We have one endorsed speaker from the Appellate Defender Office, Ms. Zimbelman.

ITEM 3 2012-11 – MCR 6.302

MS. ZIMBELMAN: Good morning. May it please the Court. Jessica Zimbelman from the State Appellate Defender Office speaking in opposition to the proposed rule. Our position is that the desire to conform with the federal rule is misplaced for two reasons. First, because Michigan's plea bargaining process is substantially different than the federal process. For example, in Michigan judicial involvement is permitted pursuant to *People v Cox*. In the federal system, the court is required to advise the defendant of any potential financial penalties that may result from a plea bargain – that is not the case in Michigan. And, of course, in the federal system the appeal from a guilty plea is by right as opposed to what we have in Michigan. And finally, probably most importantly, is that the federal system relies heavily on an extensive written form to establish all of the details of a plea bargain – that's not what happens in Michigan typically. Very rarely is a written form even used and the plea process in Michigan is much faster. The hearings are usually quite short and while they do go through the requirements of MCR 6.302 it is much quicker in Michigan

than the detailed nature of the federal rule and the federal practice. And, therefore, by adopting this proposed amendment it would cut into protections that Michigan criminal defendants enjoy now in the plea bargain context. The second reason –

CHIEF JUSTICE YOUNG: In what sense? In a sense that you can say any error is grounds for upsetting the plea -

MS. ZIMBELMAN: Mr. Chief Justice, no.

CHIEF JUSTICE YOUNG: as opposed to a harmful error.

MS. ZIMBELMAN: Well, this Court, to answer your question, since 1975 this Court has followed the substantial compliance test and that rule has been followed and well understood by the bench and the Bar for nearly 40 years. And so by changing this rule the Court would have to interpret what is prejudice and what is harmless error in the plea context – the taking of the plea itself - and that is the difference that criminal defendants here. And this Court has had many rules, many case law interpretations of what substantial compliance means, in what circumstances reversal would be warranted, and there's no case law that suggests that a rote clerical error would require a plea withdrawal reversal. Thank you.

CHIEF JUSTICE YOUNG: Thank you. There are no other endorsed speakers on Item 3 or 4 so we'll go to Item 5 – 2013-03 – proposed amendments to MCR 2.302 – concerning potential clarifications concerning discovery being available in postjudgment proceedings in domestic relations matters. We have one endorsed speaker, Mr. Kobliska.

ITEM 5 2013-03 - MCR 2.302

MR. KOBLISKA: Good morning. May it please the Court. Matt Kobliska appearing on behalf of the Family Law Section in this matter. This proposal originated with our Section back in 2012 and, of course, it takes a while for it to wind through the process. There's an axiom that goes something like if you ask three lawyers a question you get five different answers, but in this particular case –

CHIEF JUSTICE YOUNG: You should ask Justices.

MR. KOBLISKA: Pardon?

CHIEF JUSTICE YOUNG: You should ask Justices.

MR. KOBLISKA: In this particular case we've had unanimous, widespread support for our proposal. The 3rd Circuit Family Court judges said that it would clarify and add efficiency to the postjudgment domestic relations process. It would give judges more time to address substantive matters. The State Bar Board of Commissioners voted unanimously. It would provide greater judicial efficiency and reduce unnecessary costs to litigants. Michigan Probate Judges supported this. The Michigan Judges Association said that this is a common sense clarification that is consistent with current position. I guess it may be consistent with the current position of the judges that belong to the Michigan Judges Association, but our members and the reason why this proposal came about was that our members had commented to us that this rule varied from county to county and, in fact, between judges. In some cases discovery was automatic and in some cases the motioner would have to file a motion for discovery. And domestic relations cases are somewhat different from ordinary civil cases – much of what happens occurs postjudgment in modifications of child support, custody, and parenting time – and, therefore – because, for instance, child support must be based upon facts, they can't be based upon estimation or conjecture. The Michigan Child Support Formula is clear that it must be based upon actual information. So it is absolutely necessary for discovery to occur in 99 percent of cases and it seems to be kind of an unnecessary hurdle in some courts for litigants to have to engage in needless motion practice. So unless the Court has any questions about it, that's all I have.

CHIEF JUSTICE YOUNG: There appear to be none. Thank you very much.

MR. KOBLISKA: Thank you.

CHIEF JUSTICE YOUNG: The next item for which there is an endorsed witness is Item 6 – 2013-04 – concerning MCR 3.705 whether the amendments would prohibit publication of information on the internet that would reveal the identity or location of a protected party. Mr. Clawson is endorsed.

ITEM 6 2013-04 – MCR 3.705

MR. CLAWSON: Good morning. I'm Pat Clawson from Flint. I'm here in my capacity as Vice President of the Michigan Process Servers Alliance. I'm joined here in the audience today too by Mr. Larry Julian from the Michigan Council of Professional

Investigators who are joining with me in the comments to the Court. We're aware that there is a problem here with the federal law that makes it illegal to disseminate information about PPOs over the internet; we recognize there's not much we can do about the statute. But what we are asking is that when the Court issues a rule on this matter that the Court specifically include in the rule language informing the clerks that this information is available for public inspection in the courthouses and on the court data systems that are accessible to the public within the courthouse. I can tell you from experience in dealing with the courts around this state that there's gonna be a lots of clerks who are gonna think that there's some kind of a blanket ban on dissemination of this information. I serve personal protection orders; I serve them on a great frequency. I will tell you that this rule, and indeed this statute, is quite likely in the long run to lead to the death or serious injury of court officers, process servers, private investigators who are involved with serving civil process. We need access to information to determine the validity of these orders that we're serving. It's not uncommon for us to receive PPOs from private litigants – from pro se litigants – where the litigants have made changes to the court documents – changes that the courts did not authorize. I recently had that occur in a specific case I was dealing with in the metro-Detroit area where a woman had checked-off onto a PPO that a judge had issued a prohibition on her partner having access to firearms – that was not in the original order as I later discovered. I refused to serve that PPO. We need to be able to have access to these records to determine if there's a history of violence with the people that we're serving the PPOs on. Often we find there is not a history of violence, sometimes we do. Sometimes we find that these people we're serving PPOs on have been the subject of multiple requests for PPOs brought by a particular petitioner that had been rejected by other judges. So there's an issue of personal officer safety involved in serving these.

CHIEF JUSTICE YOUNG: I guess that's very interesting, but the federal government has said something that we're obligated to follow here.

MR. CLAWSON: I understand that, sir, as I acknowledged that right up front, but the rule that the Court can put out can make it very clear to the clerks that this information is available for public inspection in the clerk's office. And I'm afraid that if it is not clearly specified in the rule we're going to have continuing access problems. The way that the federal statute is written –

CHIEF JUSTICE YOUNG: Just a moment.

MR. CLAWSON: Yes.

CHIEF JUSTICE YOUNG: Aren't all records public unless they are formally suppressed, and aren't there – isn't there a court rule that prescribes how suppression of a record must be accomplished?

MR. CLAWSON: Yes, sir, there are.

CHIEF JUSTICE YOUNG: So in what – what gap is it that you purport to want us to address in the existing rules?

MR. CLAWSON: Sir –

CHIEF JUSTICE YOUNG: Records are public –

MR. CLAWSON: Sure.

CHIEF JUSTICE YOUNG: unless suppressed and you can't suppress them without a process.

MR. CLAWSON: Sir, many clerks in this state are simply not well educated in the rules as to what information is available and what is not. I run into it on almost a daily basis working in courts across the state. I just spent for instance in Genesee County recently over an hour arguing with a court clerk about access into a particular record that was open by Michigan court rules but they decided was not open. I ultimately got access to that record, but it took a persistent effort to be able to get it done. This Court needs to clarify in any rule it puts out about access to PPO orders that this information is available to the public inside the courthouse for public inspection. Now there is one problem that the Court may not have considered on this. As we're moving to complete electronic data systems in all of our courts across the state, even the internal data systems are part of the internet – are connected to the internet – anything with an IP address is considered part of the internet – that raises some serious issues as to access to the records even inside the courthouse on courthouse data systems that have any connection to the internet. This rule needs to be clarified to make it quite specific that the in-house data systems – the ones that you have to go to the courthouse to access – those are accessible to the public for inspection.

CHIEF JUSTICE YOUNG: I'm not sure I follow exactly what you've just said. I understand that anything that has an IP address is connectable to the internet.

MR. CLAWSON: Correct. And what I'm concerned about is that a lot of clerks are gonna interpret this – and I say this from experience – a lot of clerks are gonna interpret this well that system has an IP address, it's an internet address, it's an internet accessible database, we can't allow you to have access to that. There is a need here for some education.

CHIEF JUSTICE YOUNG: Unrelated to PPOs?

MR. CLAWSON: I'm sorry, sir.

CHIEF JUSTICE YOUNG: Unrelated to PPOs?

MR. CLAWSON: Well, any of the court data systems that have an IP address have the ability to be connected to the internet – that's what an internet protocol address is about.

CHIEF JUSTICE YOUNG: But this rule addresses only PPOs.

MR. CLAWSON: Correct.

CHIEF JUSTICE YOUNG: Okay, so I'm not sure what metastasis you're seeing.

MR. CLAWSON: What I'm saying, sir, is that once this information is into any kind of a system that is internet accessible, you're gonna have court clerks on their own decide that that information is not available for public dissemination in any way even if it's within the courtroom – even within the courthouse. I think the Court needs to clarify its rule that this information is accessible to the public. And I will tell you –

CHIEF JUSTICE YOUNG: I think I understand your point.

MR. CLAWSON: I'm sorry, sir?

CHIEF JUSTICE YOUNG: I think I understand your point.

MR. CLAWSON: The problem we have –

CHIEF JUSTICE YOUNG: You need to conclude.

MR. CLAWSON: I'm sorry, sir?

CHIEF JUSTICE YOUNG: You need to conclude.

MR. CLAWSON: The problem we have is that we as process servers and court officers and private investigators we do not have access to the LIEN system – that is solely for criminal justice purposes – it's not for civil justice purposes. Process servers get assaulted all the time. We have a need for information. I've given you a copy of a story that was in the Oakland Press yesterday about a process server who was assaulted down in Oakland County serving process. I'm very familiar with that process server – that process server was me. And I was limited being able to get access to information that I needed in serving that particular paper because of some restrictions on a data system in Livingston County.

CHIEF JUSTICE YOUNG: Thank you very much.

MR. CLAWSON: Thank you, sir.

CHIEF JUSTICE YOUNG: Item 7 has no endorsed speakers. Item 8 is 2013-41 and it has two endorsed speakers and it concerns the administrative order concerning disputes between courts and their funding units. The first speaker is Mr. Newman.

ITEM 8 2013-41 – AO 1998-5

MR. NEWMAN: Good morning your honors. I'm Karl Newman and I am here today on behalf of Wayne County. I will be brief. We were originally concerned that the if applicable and if not applicable language indicated that the administrative order – excuse me – that PA 172 might not apply to lawsuits brought by the circuit court or county funded courts, but with the benefit of the State Bar of Michigan's comments we now see that that language simply reflects the fact that Administrative Order 1998-5 applies to all trial courts while PA 172 applies only to county funded courts. So by if applicable the order means that PA 172 applies if the trial court in question is county funded, having said that we request that the order be revised to expressly refer to county funded courts. For example, paragraph 2 could be revised to read as follows. If the court concludes that a civil action to compel funding is necessary, a civil action may be commenced by the chief judge. A county funded court shall proceed in accordance with MCL 141.436 and MCL 141.438. For other courts the state court administrator must assign a disinterested judge to provide over the action.

CHIEF JUSTICE YOUNG: That's a lot of words.

MR. NEWMAN: Well, I worked hard on –

CHIEF JUSTICE YOUNG: Do you think people are not competent to determine whether the court being a funded court – county funded court is subject to the act versus not?

MR. NEWMAN: No, I do not, but I do –

CHIEF JUSTICE YOUNG: Which lawyers do you think are gonna be unable to make that basic judgment, including the state court administrator?

MR. NEWMAN: I do not believe any judge would or lawyer would have that difficulty.

CHIEF JUSTICE YOUNG: Then why do we need all those extra words to express this administrative order applies generically to everybody only some of which trial courts are subject to the state statute.

MR. NEWMAN: We wanted to foreclose any suggestion that PA 172 might not apply to those courts.

CHIEF JUSTICE YOUNG: The county court?

MR. NEWMAN: Yes, to those courts being –

CHIEF JUSTICE YOUNG: I guess you'd have to be able to read the statute to know that they do.

MR. NEWMAN: Well, yes, you would, you would.

CHIEF JUSTICE YOUNG: But not in Wayne County.

MR. NEWMAN: No, no, we can – we are working for clarification, that's all, and maybe not even clarification is the correct word, just to emphasis that this public act which we really worked very hard on in getting through the Legislature on a very important issue to the county –

CHIEF JUSTICE YOUNG: Okay, what's your next issue?

MR. NEWMAN: Well, your honor, that is actually all that I had to say on this point.

CHIEF JUSTICE YOUNG: If applicable.

MR. NEWMAN: Yes.

CHIEF JUSTICE YOUNG: Thank you.

MR. NEWMAN: Okay, thank you for your time.

CHIEF JUSTICE YOUNG: The next endorsed speaker is Mr. McGuire of the Michigan Association of Counties.

MR. McGUIRE: Good morning. May it please the Court. I'd like to just comment on and thank you for adopting Administrative Order 1998-5. The order has for many years assisted counties and funding units of the courts resolving some of their differences. And I also appreciate the cooperation from the Supreme Court that I've had as the Executive Director of the Michigan Association of Counties and your cooperation to help us try and move along and resolve some of these funding disputes. However, the administrative order in some – in recent years has been ignored by just a few judges and I've also been made aware that some judges are not even aware of the order. So I have a proposal that may help that at the end of my remarks.

CHIEF JUSTICE YOUNG: You'd like to tattoo it on judges' foreheads.

MR. McGUIRE: Well, I don't know, maybe we could do that.

CHIEF JUSTICE YOUNG: I'll let you be the proponent of that.

MR. McGUIRE: Thank you. Some of the disputes have arisen because of the economic problems over the last couple of years and we're really trying to communicate how we can make a balance between the legislative branch and the judicial branch at the local level and we've attempted to do that. One of the key points that I think has been – one of the sticking points has been when a dispute arises and the judge threatens to file a lawsuit and then threatens that the attorney fees would have to be paid – borne by the county and that was the instance in *46th Circuit Trial Court v Crawford Co* and the court did not decide the issue of attorneys' fees, but rather let the lower court's ruling stand and thus providing no relief and those attorneys' fees for those three counties in that circuit were over $1 million.

JUSTICE MARKMAN: Mr. McGuire, I remember that follow-up case to the *46th Circuit* in which we dealt with the attorneys' fees, and I recall having a certain sense that it seemed unfair to be imposing upon the county not only its own attorneys' fees but the attorneys fees of the judges who had sued the county. But on further reflection, I guess the obvious question is who else can pay for the attorneys fees?

MR. McGUIRE: Well, I don't really have an answer to that, but I have a proposal that might provide a solution.

JUSTICE MARKMAN: Okay.

MR. McGUIRE: And that is I've been working with the State Court Administrator's Office and it's our proposal that we would engage some of the members of the court to have a session – educational session with the chief judges throughout the state and the chairs of the various county boards of commissions that would explain what is – what responsibilities are at the local level with regard to the funding unit and –

JUSTICE MARY BETH KELLY: Don't you think that's already been done? Don't you think that our State Court Administrator works with the chief judges and talks about funding unit disputes?

MR. McGUIRE: Oh, there's no question about, they do an outstanding job, we just want to make sure that we're –

CHIEF JUSTICE YOUNG: Yours is an educational proposal.

MR. McGUIRE: Yes, educational.

CHIEF JUSTICE YOUNG: I'm not hostile to education.

MR. McGUIRE: Right.

CHIEF JUSTICE YOUNG: Have you spoken with the State Court Administrator?

MR. McGUIRE: Yes, we have.

CHIEF JUSTICE YOUNG: Is he amenable to an educational session?

MR. McGUIRE: Yes, yes, they are.

CHIEF JUSTICE YOUNG: Mox-nix then.

MR. McGUIRE: There you have it.

JUSTICE MARKMAN: Mr. McGuire, you have a companion recommendation that has to do with how attorneys' fees would be calculated in these cases –

MR. McGUIRE: Yes.

JUSTICE MARKMAN: and I think you focus upon a local survey within the relevant jurisdiction. How significant a difference do you think that would have?

MR. McGUIRE: Well, I think it would make a significant difference because the attorney fees that are paid in the metropolitan area are certainly not the same attorney fees that are in a jurisdiction in the Upper Peninsula. And so all we're asking is that if there is a dispute and attorney fees have to be paid that they would be based upon that local area on an average rather than just comparing apples to apples.

CHIEF JUSTICE YOUNG: So then what happens when the county decides this is a really important piece of litigation and they hire somebody from the metropolitan community down in southeastern Michigan – don't they pay those fees?

MR. McGUIRE: Yes, they do.

JUSTICE MARKMAN: I mean can't you conceive that there are jurisdictions in the state – counties in the state in which there would be relatively little expertise in this area and that they would be – and that the counties would be required – the judges would be required to go well outside those counties to find effective representation?

MR. McGUIRE: Well, I guess that's just a question that you know that there's access for everyone, but –

CHIEF JUSTICE YOUNG: Well, this is an access question and, in fact, the concedingly odd and seemingly unfairness of having the funding unit – the county have to bear the expense of the attorney fees of the court even when the court fails in the litigation. I understand the apparent unfairness of it except that the constitutional provision is the courts have to have the ability to litigate the constitutional question whether they are

being funded at the constitutionally required level. I think *46th* has made it much clearer that we're talking not about a Cadillac funding level –

MR. McGUIRE: Right.

CHIEF JUSTICE YOUNG: but something more basic. But having that liability question set aside, I'm not sure how it is that you serve the access question when you've acknowledged the county is perfectly responsible in seeking whatever counsel at whatever cost to protect its interest but denying the court the same ability.

MR. McGUIRE: I don't think that that was what the attempt is to do. I think the attempt –

CHIEF JUSTICE YOUNG: But that's the effect of it, is it not?

MR. McGUIRE: Well –

CHIEF JUSTICE YOUNG: The county can hire competent counsel if it determines from the metropolitan-Detroit area, but the court that is based in an upper peninsula is stuck with the rates that it could pay a local attorney – whether those local attorneys have the competence to defend or prosecute the litigation, isn't that right?

MR. McGUIRE: I guess it's a double-edge sword and –

JUSTICE MARKMAN: Well, you're saying exactly the opposite as I understand it, aren't you. You're saying that whereas the counties will feel constrained to act in the most fiscally responsible manner, there's no similar incentive placed upon the courts.

MR. McGUIRE: That's correct.

JUSTICE MARKMAN: Am I misinterpreting what you're saying?

MR. McGUIRE: No, you're not.

JUSTICE MARKMAN: It's a conundrum, isn't it?

MR. McGUIRE: Yes, it is.

CHIEF JUSTICE YOUNG: Yeah, it is.

MR. McGUIRE: But hopefully – you know I hope that we will be able to work with our organization and the State Court Administrator's Office that we can provide a preventive measure so that these cases and these situations won't arise. We recognize that we can't regulate personalities and whether they're at the county level or they're at court level. However, we can do whatever we possibly can to make sure that everybody's aware of the circumstances, aware of the economic situation, aware of the restraints that are on the county, and the economic situation and hopefully make sure that everybody understands that and we can move along without these situations arising.

CHIEF JUSTICE YOUNG: Thank you.

MR. McGUIRE: Thank you.

CHIEF JUSTICE YOUNG: And I encourage you to continue to work with the State Court Administrator not only to educate the courts but your membership as well.

MR. McGUIRE: Yes, we will do that.

CHIEF JUSTICE YOUNG: Thank you.

JUSTICE MARKMAN: Can I ask you just one final question. I mean do you think perhaps the solution, if there is a solution to this, lies somewhere in just the idea of these things being as public as possible. I mean whether you're talking about the funding unit or you're talking about the bench I mean these are all – are both institutions that are accountable to the people. And to the extent that either one of these institutions incurs extraordinarily unjustifiable attorneys' fees you would think that simply communicating to the people what's happening would be relevant and possibly a check and a restraint upon what these institutions of government are doing.

MR. McGUIRE: That's certainly what we want to promote and to make sure that everyone's educated on this. And you know our problems are on both sides and that is we have turnover with the people that are serving on the Board of Commissioners and they need to be brought up to speed and we have people that are serving on the bench that need to be brought up to speed. And that's why we hope that we can work with the State Court Administrator's Office and this honorable Court to promote that and try the best we can from having these occurrences take place.

CHIEF JUSTICE YOUNG: Thank you very much.

MR. McGUIRE: Thank you.

CHIEF JUSTICE YOUNG: That concludes the public hearing. Thank you for coming. We're adjourned.